



November 19, 2001

Ms. Enid A. Wade
Naman Howell Smith & Lee
P.O. Box 1470
Waco, Texas 76703

OR2001-5344

Dear Ms. Wade:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 155082.

The Bell County Jail (the "county"), which you represent, received a request for "all medical and custody records" regarding a named, deceased individual. You state that 328 pages of responsive information have been provided to the requestor, but claim that certain other responsive information is excepted from disclosure under section 552.101 of the Government Code in conjunction with various confidentiality statutes, as well as under section 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that section 552.301 of the Government Code prescribes procedures that a governmental body must follow in asking this office to decide whether requested information may be withheld from the public. Section 552.301(b) provides that "[t]he governmental body must ask for the attorney general's decision and state the exceptions that apply . . . not later than the 10th business day after the date of receiving the written request [for information]." Section 552.302 provides that "[i]f a governmental body does not request an attorney general decision as provided by Section 552.301 . . . the information requested in writing is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information."

It appears that the county originally received the request for information on June 14, 2001. You did not, however, request a ruling from this office until September 14, 2001. Thus, the

county did not ask for this decision within ten business days of the date of its receipt of the request for information. However, in this regard, you also inform us that the attorney representing the county in this matter "promptly responded to the [requestor] for the purpose of responding to her request," and that "a conversation between the two left [the attorney] with the impression that the two had come to some agreement about the information which would be provided, but also left him with the impression that additional information would be provided by [the requestor] before the documents in question were produced. . . . For whatever reason, no additional information from [the requestor] was forthcoming, and, as a result, no responsive documents were provided to [the requestor]." You indicate that you have submitted as Exhibit B a letter confirming that conversation.

Under section 552.222 of the Government Code, "[i]f what information is requested is unclear to the governmental body, the governmental body may ask the requestor to clarify the request." Gov't Code § 552.222(b). Similarly, "[i]f a large amount of information has been requested, the governmental body may discuss with the requestor how the scope of a request might be narrowed[.]" *Id.* However, section 552.222(b) does not stand for the proposition that a request may be denied merely because it seeks a broad range of documents. The purpose of this section is to authorize a dialogue between the governmental body and the requestor regarding the scope of the records request.¹ Open Records Decision No. 653 at 2-5 (1999) (addressing circumstances under which governmental body's communications with a requestor to clarify or narrow a request for information will toll ten-business-day deadline under section 552.301(b)). When a requestor makes a vague or broad request, the governmental body should make a good faith effort to advise the requestor of the type of documents available so that the requestor may narrow or clarify the request. *See id.* at 5. On the other hand, if the requestor chooses not to narrow a broad request, the governmental body must release all responsive information if no exception to disclosure applies.

In this case we conclude that, by simply asking the requestor to "limit that part of [her] request to documents that constitute public information," the county failed to sufficiently advise the requestor of the type of documents available so that she could limit her request. Thus, the county failed to comply with section 552.301 in requesting this decision. Therefore, the information at issue must be released, unless there is a compelling reason to withhold any of that information from the public. *See* Open Records Decision Nos. 630 at 3 (1994), 150 at 2 (1977). The county's claim under section 552.108 is not a compelling reason that overcomes the failure to comply with section 552.301. *See* Open Records Decision No. 177 at 3 (1977) (governmental body may waive statutory predecessor to section 552.108). Accordingly, the information you have submitted as Exhibit G may not be withheld under section 552.108. However, as you also assert that certain information is confidential by law, we will address your arguments for withholding that information.

¹Section 552.222(b) also limits the nature of the inquiries by the governmental body to those regarding the requested documents themselves. This section prohibits the governmental body from inquiring into the purpose for which the requestor seeks the records.

You assert that certain medical records submitted as Exhibits D and E are excepted under the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Similarly, Rule 509 of the Texas Rules of Evidence, which you also raise, provides that confidential communications between a physician and patient as well as a physician's records of the identity, diagnosis, evaluation, or treatment of a patient are privileged in a civil proceeding and protected from discovery. We agree that the information in Exhibit D consists of medical records subject to the MPA. *See* Open Records Decision Nos. 598 (1991), 546 (1990) (because hospital treatment is routinely conducted under supervision of physicians, documents relating to diagnosis and treatment during hospital stay would constitute protected MPA records). The medical records in Exhibit D are confidential and, as the patient is now deceased, may be released only on the signed consent of the deceased's personal representative. Occ. Code §§ 159.005(a)(5). The consent must specify (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). We also find that some of the information in Exhibit E consists of medical records subject to the MPA. These medical records, which we have marked, may be released only as provided under the MPA. Open Records Decision No. 598 (1991).

Next, we address your argument for withholding the information in submitted Exhibit F, which consists of a custodial death report. In Open Records Decision No. 521 at 5 (1989), this office concluded that under article 49.18(b) of the Code of Criminal Procedure, in conjunction with a directive issued by the Office of the Attorney General, section one of a custodial death report filed with this office is public information, but sections two through five of the report, as well as attachments to the report, are confidential. *See* Code Crim. Proc. art. 49.18(b) (attorney general shall make report, with exception of any portion of report that attorney general determines is privileged, available to any interested person). Thus, the county must release section one of the custodial death report to the requestor. However, because sections two through five of the report are deemed confidential under

article 49.18(b), the department must withhold the remaining portions of the custodial death report under section 552.101 of the Government Code.²

Section 552.101 also protects information made confidential under common law privacy. Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). This office has found that information concerning the intimate relations between individuals and their family members is excepted from required public disclosure by a right of privacy, *see* Open Records Decision No. 470 (1987). We also note that the right of privacy is purely personal and lapses upon death. *See Moore v. Charles B. Pierce Film Enterprises Inc.*, 589 S.W.2d 489 (Tex. Civ. App.--Texarkana 1979, writ ref'd n.r.e.); *see also* Attorney General Opinions JM-229 (1984); H-917 (1976); Open Records Decision No. 272 at 1 (1981).

Upon review of the information contained in Exhibit G, we find that a portion of it, which we have marked, is protected by privacy. This information must be withheld under section 552.101.

Finally, Exhibit H contains a document you assert is confidential pursuant to statutory law. This document states on its face that it is confidential under part 2 of title 42 of the Code of Federal Regulations. Those rules provide, in pertinent part:

²Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to alcoholism or alcohol abuse education, training, treatment, rehabilitation, or research, which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall, except as provided in subsection (e) of this section, be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b) of this section.

42 C.F.R. § 2.2(a). Therefore, we find that the information in Exhibit H is confidential pursuant to federal law and must therefore be withheld from the requestor under section 552.101 of the Government Code.

To summarize, as the county failed to meet the ten-business-day deadline prescribed by section 552.301(b) for submitting a request for a ruling to this office, the county waived its right to raise section 552.108. However, we find that all of the information in Exhibit D and a portion of the information in Exhibit E is confidential pursuant to the MPA and may only be released in accordance with that statute. With regard to the information in Exhibit F, sections two through five of the report are deemed confidential under article 49.18(b) of the Code of Criminal Procedure, and therefore are excepted from disclosure under section 552.101 of the Government Code. The information we have marked in Exhibit G must be withheld under section 552.101 in conjunction with common law privacy, and the information in Exhibit H must be withheld under section 552.101 in conjunction with federal regulations. The remainder of the submitted information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the

governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/seg

Ref: ID# 155082

Enc. Submitted documents

c: Ms. Meredith Rountree
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(w/o enclosures)